IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. —.

DANIEL F. BOONE, *Petitioner,*

v.

MARTHA LIGHTNER BOONE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the U. S. Court of Appeals for the District of Columbia is reported in 76 Appeals D. C. ....., Fed. (2d) (Adv. sheets) (R. 81-82).

JURISDICTION.

The petitioner contends he is entitled to have the opinion of the U. S. Court of Appeals for the District of Columbia reviewed by virtue of Section 237 (b) of the Judicial Code as amended, since,

(1) He has been denied a question of substance which has resulted in a denial to him of due process of law as guaranteed by the 5th Amendment to the Constitution of the United States.

(2) The lower court has erroneously decided a question of substance relating to the construction of the Constitution by giving effect to a judgment under the full faith and credit provision of the Federal Constitution and which judgment is not entitled to such full faith and credit.

This court has held that when the effect of res judicata is challenged for want of due process then certiorari will be granted. Thus, in the case of *Hansberry* v. *Lee,* 311 U. S. 32 this court stated:

> "But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the constitution prescribes."

While the 14th Amendment to the Constitution guarantees Due Process by state courts, nevertheless, the 5th Amendment guarantees similar process in Federal Courts. The lower court in this case is a Federal Court and is accordingly bound by the guarantees of the 5th Amendment.

In re: *Fayerweather* v. *Ritch,* 195 U. S. 276, this court stated that where one court by giving unwarranted effect to a judgment of another court, has deprived a person of his property without due process of law, the application of the Constitution is involved and this Court has jurisdiction on appeal.

SPECIFICATION OF ERRORS TO BE URGED.

1. The lower court erred in failing to go behind the interlocutory order of the North Carolina Court.

2. The lower court erred in holding itself "bound" by the North Carolina Order and in giving to it the effect of res judicata, when such order is not a final order so as to be entitled to full faith and credit under the Federal Constitution.

3. It is a violation of Due Process of Law in failing to give petitioner a full hearing on a Writ of Habeas Corpus when the lower court erroneously concludes it is bound to give full faith and credit to a judgment which is not entitled to full faith and credit under the Federal Constitution.

4. It is a violation of Due Process of Law in denying the petitioner the right to rebut the statements of the respondent in the Writ of Habeas Corpus in which she stated that she was a fit and proper person to have the custody of the children.

5. It is a violation of Due Process of Law in a matrimonial action, whether annulment, divorce, or separation, to award custody when the court fails to enter a judgment or decree on the primary issue involved.

SUMMARY OF ARGUMENT.

The opinion of the Court below states that the trial court was correct in giving the effect of res judicata to the North Carolina Decree. There is no question but that the trial court did give the effect of res judicata to the North Carolina Order, since the trial court stated that he "was bound by the terms of the final judgment" of the North Carolina Court.

It is elementary that a judgment must be final and conclusive in order to come within the full faith and credit provision of the Federal Constitution. The North Caro-

lina decree is not a final decree and is not entitled to full faith and credit. It is apparent from the record that the court below considered the judgment of the North Carolina Court as being final and conclusive and, accordingly, entitled to full faith and credit under the Federal Constitution (R. 23, 31, 32). The trial court stated in his Conclusions of Law that he was "bound by the terms of the final judgment" of the North Carolina Court (R. 26). *However, the judgment here sued upon was not and is not final or conclusive.*

The North Carolina judgment *upon its face lacks the necessary* ingredients of a final judgment so as to be entitled to full faith and credit under the Federal Constitution, since:

1. The principal issue in the North Carolina action (divorce) *is still pending FOR trial.*

2. The North Carolina Order itself states that the cause "is retained for further orders" and therefore is not final.

ARGUMENT.

It is elementary law that a judgment must be final and conclusive in order to come within the full faith and credit provision of the Federal Constitution (Article IV, par. 1, sec. 1).

The most recent case on this point in the District of Columbia is the one of *Operative Plasterers and Cement Finishers International Association of the United States and Canada* v. *Case,* 68 App. D. C. 43. That court reaffirmed the well established rule in the following language:

> "The instant suit upon a North Carolina judgment is brought in the District Court of the United States for the District of Columbia under the full faith and credit clause of the United States Constitution providing that:
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> " 'Full Faith and Credit shall be given in each state to the * * * Judicial Proceedings of every other State.'

"Under that clause the courts of one state need give no greater effect to a judgment of the courts of another than that judgment has in the latter; *for example, if a judgment is inconclusive in a state where rendered, it is equally inconclusive in a sister state.*" (Italics supplied).

In *Barnes* v. *Lee,* 128 Or. 655, 275 P. 661, the court stated:

"We refrain from a consideration of the testimony brought out in this case, as it would serve of no useful purpose, and, in our opinion, there is only one question to be settled, and that is, under all considerations, what is best for the child? We do not feel ourselves bound by the decree of the Oklahoma court in either of the proceedings mentioned, as neither was final, but in both instances the custody was only granted '*subject to the further order of the court*', and while the judgment is a finality, which the courts of this state must respect as to the divorce, it is not such a final judgment as the courts of this state are bound to carry out as to the custody of the child. *In any event such a decree is only advisory.* A decree in a divorce proceeding, which grants to one of the parties the custody of a child *subject to the further order of the court,* while it may be a final decree for the purpose of an appeal, is not a final decree within the 'full faith and credit' clause of the Constitution of the United States, so far as the question of custody is concerned, when raised in a State other from that in which the decree was rendered." (Italics supplied)

In the well considered case of *People Ex Rel Multer* v. *Multer,* 175 N. Y. S. 526, the same question arose upon a habeas corpus proceeding to determine the right of the relator to the custody of an infant seven years of age.

In that case the relator based his right to the custody of the child upon a judgment or order made by the Probate Court in the State of Massachusetts. A Massachusetts statute gives the Probate Court power to make decrees relative to the care, custody, education, and maintenance of infant children, and to determine which of the parents of such children shall be entitled to such custody.

The Probate Court in Massachusetts had signed an order "that said Virgilio Multer have custody and possession of said minor child *until the further order of the court,* * * *".

It was the contention of the relator in that case that the said order was of such a character that it came within the full faith and credit requirement of the Federal Constitution. The defendant, on the other hand, contended that the order was merely interlocutory and therefore not entitled to such full faith and credit. The court in that case stated as follows:

> "No question becomes res adjudicata until it is settled by a final judgment, and has no application to an interlocutory order. I am convinced that the defendant's contention is correct. The authority of the Probate Court is that it 'shall determine which of the parents of such children shall be entitled to such custody in accordance with the law relative to the custody of children whose parents have been divorced'. * * * It thus appears that the Probate Court was without power to make a final decree and for all time fix the status of the child."

In the leading case of *Lynde* v. *Lynde,* 162 N. Y. 405, 56 N. E. 979, it appears that an action was brought upon a final decree of the Court of Chancery of the State of New Jersey which adjudged that the plaintiff was entitled to recover a certain sum which had accrued for alimony, and further requiring the defendant to pay permanent alimony at the rate of eighty dollars ($80.00) per week.

The New York Court of Appeals in a review of the law under consideration states:

> "With respect to how far the Supreme Court of this state will enforce the final decree of the New Jersey Court, I think the determination of the Appellate Division to be quite correct. The action was to recover upon a final decree of the court of another state, which, being rendered with jurisdiction over the person of the defendant, is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff

> at the date of its rendition. * * * So far, as it made provisions for the payment of alimony in the future, it remained subject to the discretion of the Chancellor and lacked conclusiveness of character. The Chancellor's action was not final on the subject. As he observed in referring to the laws of New Jersey; 'the statute exhibits an intention that the subject shall be continuously dealt with according to the varying conditions and circumstances of the party'. *The provision of the Federal Constitution, which requires that full faith and credit shall be given to judicial proceedings of another state, in my opinion should be deemed to relate to judgments, or decrees, which not only are conclusive in the judisdiction where rendered but which are final in their nature.*" (Italics supplied)

In the case of *Crayne* v. *Crayne,* 54 Nev. 205; 13 P. (2) 222, decided on August 4, 1932, the court stated:

> "It is well settled that the doctrine of res adjudicata is available only after a final decree has been entered. * * * The prevention of the retrial of such litigated points in another action is the purpose of the full faith and credit requirement of the Federal Constitution, and that purpose would be largely frustrated if anything short of a final judgment were permitted to prove a bar to an action upon the principle of res adjudicata. Interlocutory orders or judgments will not, therefore, operate as res adjudicata."

In the case of *Cooke* v. *Cooke,* 67 Utah 371; 248 P. 83, it appears that a Canadian Court awarded custody of a child to the husband "to remain in his care and custody until the court or judge shall make other order to the contrary." The Utah Court in that case held that this was merely an interlocutory order and that by the same principle, which precluded that court from giving full faith and credit to such an order, they refused to extend the Doctrine of Comity to said order. The Utah court in that case stated as follows:

> "While the full faith and credit clause of the Constitution applies only to judicial proceedings of other

> states, yet, under the Doctrine of Comity, we are not required to give greater effect to an order or judgmen of a foreign country than we would to that of a sister state; and on principle there is no good reason why we, under such doctrine should give greater effect to an interlocutory order of a foreign country than the court in which it is rendered could itself give it."

It is interesting to note that the Utah court in reaching its decision in the *Cooke case, supra,* followed and cited the decisions of *Lynde* v. *Lynde, supra, People Ex Rel. Multer* v. *Multer, supra,* and *Heavrin* v. *Spicer,* 48 App. D. C. 337, 265 F. 977.

In the case at bar the North Carolina order expressly states that "the cause is retained for further orders". The judgment is therefore not "final and conclusive" upon the North Carolina Court which rendered it, or any other Court.

The North Carolina Court has authority and power to revise or modify the judgment of custody. Since the judgment is not even binding or final upon the court that rendered it, it is much less binding upon the courts of the District of Columbia.

As the North Carolina Court Did Not Pass on the Question of Divorce, It Had No Power to Make Any Order as to Custody. The proceeding in North Carolina was one for absolute divorce. No divorce has ever been granted and no reference to a divorce is made in the order of the Judge awarding the children to the respondent. It has been repeatedly held that in a matrimonial action, whether annulment, divorce, or separation, the court is powerless to award custody when it fails to enter a judgment or decree on the primary issue involved.

In the case of *Towson* v. *Towson,* 49 App. D. C. 45, the Court stated that in a suit by the wife for a limited divorce, where it found her allegations not sustained by the evidence,

then it is without power to award her the exclusive custody of the children or permanent alimony. In its opinion that court cites the leading New York case of *Davis* v. *Davis*, 75 N. Y. 221, as follows:

> "* * * It would be an anomaly in legal proceedings to allow a complainant, who had failed to establish a claim to the principal relief sought, to have a decree against the defendant for the mere incidents of that relief.
>
> "* * * In this case, the plaintiff by her suit invoked the jurisdiction of the court to grant her a separation under statute. She failed to make a case for divorce and the defendant was, we think, entitled to a judgment of dismissal. *The court was not authorized in this action after having denied judgment of separation to award the plaintiff the custody of the children.* * * *" (Italics supplied)

In *Finlay* v. *Finlay*, 240 N. Y. 429; 148 N. E. 624, Mr. Justice Cardozo said:

> "The statute permits a judgment fixing the custody of children *as an incident to a judgment for divorce or separation. If a divorce or separation is refused, jurisdiction is not retained to adjudicate the incident upon the failure of the principal.* Relief must then be sought, not in the statutory action for divorce or separation, but by recourse to other remedies." (Italics supplied)

In *People ex rel. McCanliss* v. *McCanliss*, 255 N. Y. 456; 175 N. E. 129, (decided February 10, 1931), the Court of Appeals, speaking through Mr. Justice Cardozo observed:

> "For all that we can know at this time, the husband, when he proceeds to the trial of the action of annulment, will fail in his attempt to invalidate the marriage. If his complaint shall be dismissed, *there will be no power in that action to adjudicate the custody.*" (Italics supplied)

In *Fein* v. *Fein*, 261 N. Y. 441; 185 N. E. 693, (decided April, 1933) which was an action for separation, the Court of Appeals held that, where neither party was granted a

decree of separation, the trial court was wholly without power to make any custody award.

And in the case of *Rosenberg* v. *Rosenberg*, 241 N. Y. App. Div. 411, 272 N. Y. S. 789, the Court said in part:

> "But having dismissed the complaint, the court had no authority to make any direction concerning alimony or the custody and support of the children of the parties."

In the action at bar the North Carolina court said nothing about a divorce, but nevertheless granted the custody of the children to the wife in the same action, and clearly violated the principle that "jurisdiction is not retained to adjudicate the incident upon the failure of the principal."

CONCLUSION.

In conclusion, we rest this case on the grounds that the lower court denied the petitioner due process of law in its failure to go behind the interlocutory order of the North Carolina Court. The North Carolina decree is not *res adjudicata,* since the case "is retained for further orders" by that Court. Therefore, if the order is not final, the petitioner was denied due process of law when the trial Court below held itself bound by the fact that the North Carolina order was *res adjudicata* and therefore entitled to full faith and credit under the Federal Constitution. We contend that this is giving a man a trial without the right to speak, a trial in which he is condemned without offering a defense, a trial without any of the elements of justice and fairness.

We further contend that it is a violation of due process of law to allow the respondent to raise an affirmative statement in her Habeas Corpus petition that she is a fit and proper person and not allow the petitioner the right to rebut that statement. It allows one to raise a question which can be rebutted without giving the petitioner a right to rebut. This

is the same principle of a trial without the rigth to speak.

And finally we conclude that the District Court had no jurisdiction to hold itself bound by the North Carolina decree when the case involved was a divorce action which was never granted, since the North Carolina decree awarded custody of the minor children. This is the same effect as giving the court authority to try all embracing facts not relevant to the primary issue. The only way that the North Carolina Court could have retained jurisdiction in this case was to grant an absolute divorce to the petitioner, but when the North Carolina Court failed to grant this divorce action to the petitioner, it lost jurisdiction in the case before it to award custody of the minor children and when it did proceed to award custody of the minor children, such judgment or decree was null and void and certainly did not have extraterritorial effect and certainly did not come within the purview of the Federal Constitution whereby such judgment would be entitled to full faith and credit in a sister state.

Therefore, we submit that this Court should grant a Writ of Certiorari so that the petitioner may have a fair and impartial trial and all the facts for the best interest of the children can be brought before the court.

Respectfully submitted,

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